

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

BOB McNEIL, an individual, on behalf of  
himself, and all others similarly situated,

Plaintiff,

v.

CAPITAL ONE BANK, N.A.,

Defendant.

CASE NO. 1:19-CV-00473-FB-RER

**PLAINTIFF’S NOTICE OF FURTHER SUPPLEMENTAL AUTHORITY (S.D.N.Y.)**  
**SUBMITTED IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**  
**COMPLAINT**

Defendant Capital One’s Response to Plaintiff’s Notice of Supplemental Authority (ECF No. 44), filed today, seeks to distinguish the supplemental authority Plaintiff previously submitted. Plaintiff leaves the application of this caselaw to the Court and will not respond to Defendant’s improper argument. More importantly, however, the growing weight of authority concerning the viability of Plaintiff’s “single-item” interpretation with respect to NSF Fees can hardly be in doubt now, given yet another analogous opinion decided yesterday (March 17, 2020) by Judge Caproni in this Court’s sister district.

In *Perks et al v. TD Bank, N.A.*, Case No. 1:18-cv-11176-VEC (S.D.N.Y. March 17, 2020) (attached as Exhibit 1) the court denied a bank’s motion to dismiss in a nearly identical case. In that case, similar to here, the definition of the term “item” included “a[n] . . . ACH transaction . . . and any other instruction or order for the payment, transfer, deposit or withdrawal of funds.” Ex. A at 4-5 (emphasis added). The court determined that “the definition of ‘item’ is ambiguous with regard to whether a

resubmission of an ACH transaction is a separate item or is part of the same initial ACH transaction, and that ambiguity must be read in favor of Plaintiffs at this stage. Because Plaintiffs' proposed construction is a reasonable construction of the Agreement, Plaintiffs have sufficiently alleged a breach resulting from multiple overdraft charges imposed as a result of resubmissions of a single ACH transaction." *Id.*

Dated: March 18, 2020

Respectfully submitted,

/s/ Steven M. Nathan

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**CERTIFICATE OF SERVICE**

I certify that on March 18, 2020, a true and accurate copy of the foregoing Plaintiff's Notice of Supplemental Authority Submitted in Opposition to Defendant's Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Steven Nathan